(2)

No. 94-2025

Supreme Court, U.S.
FILED
JUL 11 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JOHN T. ENGSTROM, *et al.*,

Petitioners,

v.

THE FIRST NATIONAL BANK OF EAGLE LAKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT THE FIRST NATIONAL BANK OF EAGLE LAKE, IN OPPOSITION

Of Counsel:

DAVID M. BOND
ERNEST J. BLANSFIELD, JR.
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
Telephone: (713) 758-2586
Facsimile: (713) 615-5554

CHARLES W. SCHWARTZ
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
Telephone: (713) 758-3852
Facsimile: (713) 615-5504

Counsel of Record for Respondent The First National Bank of Eagle Lake

July 11, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the lower courts' decisions that the First National Bank of Eagle Lake ("First National") did not violate the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501-591 (1988 & Supp. 1994), (the "Civil Relief Act") was consistent with this Court's holding in *Conroy v. Aniskoff*, ___ U.S. ___, 113 S. Ct. 1562 (1993).

2. Whether the lower courts correctly applied *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and their progeny in determining that petitioners failed to raise an issue of material fact in support of their claim that First National seized and sold John Engstrom's farm equipment in violation of the Civil Relief Act.

3. Whether the Fifth Circuit Court of Appeals was correct in rejecting petitioners' claim that First National violated section 532(4) of the Civil Relief Act.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

REASONS FOR DENYING THE WRIT 5

I. THE LOWER COURTS DID NOT MISCONSTRUE THE CIVIL RELIEF ACT 6

II. THE LOWER COURTS CORRECTLY APPLIED THE LAW GOVERNING SUMMARY JUDGMENTS 8

A. Petitioners Did Not Raise an Issue of Fact Supporting Their Claim That First National Caused the Sale 9

B. Petitioners Did Not Raise an Issue of Fact on Their Claim That Clipson Was First National's Agent 13

III. FIRST NATIONAL IS NOT LIABLE UNDER § 532(4) OF THE CIVIL RELIEF ACT 14

CONCLUSION 16

APPENDIX 1A

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 5, 8

Capps v. Humble Oil & Refining Co., 536 F.2d 80 (5th Cir. 1976) 7

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5, 8

Coleman v. Associated Pipeline Contractors, Inc., 444 F.2d 737 (5th Cir. 1971) 7

Conroy v. Aniskoff, ___ U.S. ___, 113 S. Ct. 1562 (1993) 4, 5, 6

Engstrom v. First National Bank of Eagle Lake, 47 F.3d 1459 (5th Cir. 1995) 4, 8

Katsev v. Coleman, 530 F.2d 176 (8th Cir. 1976) 7

United States v. Board of Education, 469 F.2d 1315 (5th Cir. 1972) 7

Williams v. United Distributive Workers, 529 F.2d 509 (6th Cir. 1976) 7

OTHER

Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. app. §§ 501-591 (1988 & Supp. 1994) ..... *passim*

No. 94-2025

In The

Supreme Court of the United States

October Term, 1995

JOHN T. ENGSTROM, *et al.*,

Petitioners,

v.

THE FIRST NATIONAL BANK OF EAGLE LAKE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT THE FIRST NATIONAL BANK OF EAGLE LAKE, IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' description of the record as contained both in the statement of the case and in the argument is inaccurate in numerous respects. The following summary accurately sets forth the record and also points out those mischaracterizations of the record pertinent to the issues presented:

This lawsuit arises out of a sale at an equipment auction of farm equipment owned by one of the petitioners, John T. Engstrom. The remaining petitioners are John Engstrom's wife, his three daughters, a joint venture (JTE Farms Joint Venture) in which he and two of his daughters

were joint venturers, and a corporation (Coltair Farms, Inc.), the stock of which he owns.

In 1989 and 1990, First National made several farming-related loans to John Engstrom, Coltair Farms, and JTE Farms Joint Venture. R.7. Because of successive poor farming performances, none of the loans were paid in accordance with their terms. Sometime during late summer 1990, John Engstrom learned that he would likely be reactivated to active duty in the Navy as a part of the Desert Storm campaign. In anticipation of his departure, John Engstrom made arrangements with his neighbor and friend, James H. "Jim" Clipson, Jr. to sell his farm equipment on a private treaty basis, *i.e.*, individually negotiated sales, directing that the proceeds be used to repay the maturing bank loans.[1] R.7. First National consented to the private treaty sales.[2]

---

[1] The equipment had been pledged to secure John Engstrom's obligations at First National.

[2] Petitioners assert several times in the petition that First National was to supervise Jim Clipson's private treaty sales. As is discussed in more detail below, the record does not support this assertion. The record evidence establishes only that First National approved the sales, in its capacity as lienholder. There is no record evidence that First National agreed or represented that it would supervise John Engstrom's agent, Jim Clipson, in the sale of the equipment. The record clearly establishes that responsibility for the sale of the equipment was delegated to Jim Clipson by John Engstrom. *See, e.g.*, R.780 (affidavit of John Engstrom). ("I told Mr. Wegenhoft that I had asked Jim Clipson to sell some of the farm equipment to pay off the notes at the Bank. . . . Before I left home, I told Mr. Clipson to sell the equipment piece by piece and that he could use our barn as a showplace. I also asked him to make repairs to the equipment so as to have a better chance at selling the equipment.")

The auction about which the petitioners complain was not a foreclosure sale of "various bank debtors' properties", as the petitioners assert. Petition at 11. In August 1990, Sam Thomson, an officer of First National, talked with Billy Bode an auctioneer in El Campo, Texas, about conducting an area-wide equipment auction in Eagle Lake. R.1662. The auction was not arranged to sell Mr. Engstrom's equipment, as petitioners imply, petition at 11, but rather as an accommodation to farmers in the surrounding community who had a desire to sell their surplus farm equipment. R.1660. Mr. Thomson arranged for the auction site. The auction was scheduled to take place in January 1991, a time when John Engstrom was on active service. R.7.

Petitioners contend that First National, with the cooperation of Jim Clipson, repossessed John Engstrom's farm equipment and had it sold at the auction. R.7. But First National did not repossess the equipment and take it to the auction to be sold. Jim Clipson did. R.242, 246-49. First National did not ask or direct Jim Clipson to gather up the equipment and take it to the auction. R.246-49. In fact, although disputed by John Engstrom, Jim Clipson testified that he took the equipment to the auction because John Engstrom asked him to do so one weekend when he returned to town after having been activated. R.248-49.

On September 1, 1992, after the lawsuit had been on file for more than a year, R.1-19, and after discovery in the lawsuit was substantially complete, First National filed the motion for summary judgment which is the subject of this petition. R.228-79. On September 2, 1993, the district court entered orders: (1) granting defendant's

motion for summary judgment as to the petitioners' Civil Relief Act claims, on the basis that it was Jim Clipson, not First National, who had sold John Engstrom's equipment; (2) granting leave to petitioners to add two state law legal theories based on the same conduct; and (3) remanding the state law claims. R.E.B:1; R.E.D:1-2; R.2530, 2527-28. The petitioners' appeal and First National's cross-appeal followed. Appellee's R.E.1:1-3; R.E.F:1-2; R.2531-34, 2551. The Fifth Circuit affirmed the trial court's rulings. *Engstrom v. First National Bank of Eagle Lake*, 47 F.3d 1459 (5th Cir. 1995) (Petition, Appendix 1-12).

SUMMARY OF THE ARGUMENT

1. The determination of the Fifth Circuit Court of Appeals that petitioners failed to raise an issue of fact in support of their claim that First National seized and sold John Engstrom's equipment at auction in violation of the Civil Relief Act was consistent with *Conroy v. Aniskoff*, ___ U.S. ___, 113 S. Ct. 1562 (1993).

2. The undisputed record evidence is that the equipment was not seized and sold at auction by First National, but rather was sold by Jim Clipson acting, he believed, at the direction of John Engstrom, and not at the request of First National.

3. Because First National did not seize and sell John Engstrom's equipment, it also did not cause a sale of such equipment in violation of section 532(4) of the Civil Relief Act.

REASONS FOR DENYING THE WRIT

The specific allegation of petitioners' complaint was that First National seized John Engstrom's farm equipment and sold it at an auction while he was on active duty. R.7. Petitioners alleged that, by doing so, First National violated the Civil Relief Act's prohibition on sales by lenders to satisfy indebtedness owing to them by servicemen on active duty. 50 U.S.C. app. § 532(3) & (4) (Supp. 1994). The record, however, did not support petitioners' claim that First National had seized and sold the equipment at auction to satisfy indebtedness and, instead, established that the equipment was sold by Jim Clipson acting, he believed, at the direction of John Engstrom, and not at the direction (or even the request or encouragement) of First National. R.246-49. After a careful review of the record evidence, the district court, applying principles governing motions for summary judgment enunciated by this Court, granted summary judgment. The Fifth Circuit, applying the same well-settled principles, affirmed.

Petitioners' complaints about the lower court decisions are threefold. First, petitioners claim that in "construing" section 532(3) of the Civil Relief Act the lower courts failed to follow *Conroy v. Aniskoff*, ___ U.S. ___, 113 S.Ct. 1562 (1993), allegedly by failing to apply the Civil Relief Act literally and broadly. Second, petitioners argue that the lower courts did not properly apply the principles established by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and their progeny in evaluating the summary judgment evidence, because they allegedly "disregarded" evidence supporting petitioners' Civil Relief Act

claims. Third, they argue that the Fifth Circuit erred in determining that they had no claim under section 532(4) of the Civil Relief Act. As is shown below, none of petitioners' arguments has merit.

I

THE LOWER COURTS DID NOT MISCONSTRUE THE CIVIL RELIEF ACT

Petitioners' first argument is that the Fifth Circuit "disregarded [the] mandate [of *Conroy*] regarding construction of the [Civil] Relief Act's terms" which, petitioners say, is that the statute must be at once "literally" and "broadly" construed. Petition at 15. In *Conroy*, the issue presented was whether section 525 of the Civil Relief Act, relating to the suspension of periods of time for redemption of real property forfeited for payment of unpaid taxes, should be construed to apply only to cases in which the soldier's active service status had impaired his ability to pay the taxes. Not surprisingly, since that section of the Civil Relief Act, unlike others, contained no impairment requirement and since the legislative history did not support the implication of such an impairment requirement, this Court held such an implication was improper. Here, by contrast, summary judgment was not granted because petitioners could not satisfy an implied statutory amendment to the Civil Relief Act. Nor did the lower courts refuse to construe the statute literally or broadly. Rather, as is discussed in detail in Section II below, petitioners' claims failed because petitioners could not proffer evidence supporting the allegation of their complaint that First National had violated the Civil Relief

Act by seizing and selling John Engstrom's equipment to satisfy obligations owing to it.

Petitioners now assert, however, that, even if First National did not seize and sell John Engstrom's equipment, as they alleged in their complaint, First National could nevertheless be held liable under a literal and broad interpretation of the Civil Relief Act, because First National allegedly "benefitted" from the sale of John Engstrom's farm equipment. Petition at 16. This argument, however, was not timely raised below. It was neither pled nor advanced in the district court and was asserted for the first time in Petitioners' Reply Brief before the Fifth Circuit. It is elementary that petitioners cannot complain of the decisions of the lower courts on the basis of allegations of wrongdoing and theories of liability that they did not advance to the trial court. *See, e.g., Capps v. Humble Oil & Refining Co.*, 536 F.2d 80, 81-82 (5th Cir. 1976); *United States v. Board of Education*, 469 F.2d 1315, 1316 (5th Cir. 1972); *Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737, 740 (5th Cir. 1971); *Katsev v. Coleman*, 530 F.2d 176, 180 (8th Cir. 1976); *Williams v. United Distributive Workers*, 529 F.2d 509, 510 (6th Cir. 1976).

Moreover, even if petitioners had timely advanced their "benefit" theory, summary judgment would still have been proper. There is no language in the Civil Relief Act purporting to impose liability on a lender who only "benefits" from a sale by someone else, but who does not himself seek to enforce repayment of an obligation. Similarly, petitioners have not cited to any case in which such liability was imposed. In short, petitioners' benefit theory is legally untenable.

II

THE LOWER COURTS CORRECTLY APPLIED THE LAW GOVERNING SUMMARY JUDGMENTS

Petitioners' second argument is that the lower courts misapplied the standard for the review of evidence submitted in connection with summary judgment motions. More specifically, they complain that:

> Both the district court's memorandum and the opinion of the court of appeals give lip service to the proper standard of review of the evidence pertaining to a motion for summary judgment under *Celotex Corp. v Catrett*, 477 U.S. 317, 322 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, and their many progeny. *See, e.g., Engstrom*, 47 F.3d at 1462. But the lower courts' ostensible application of the *Celotex/Anderson* standard to the evidence of record in this case reflects more a zeal for granting summary judgments than a fair and proper consideration of the evidence.

Petition at 17. As the foregoing quotation makes plain, however, petitioners' complaint is not that the district court or the Fifth Circuit failed to apply the summary judgment standards established by *Celotex* and *Liberty Lobby*. Instead, their complaint is only that they disagree with the conclusion the district court and the Fifth Circuit reached in applying the facts of this case to those standards. Unless this Court is to review all summary judgments, such a disagreement provides no basis for this Court to exercise its power of discretionary review.

Furthermore, the trial court's decision to grant the summary judgment motion and the Fifth Circuit's decision to affirm the judgment were correct. The undisputed

record evidence is that John Engstrom's farm equipment was not seized by First National and sold at its direction, as petitioners alleged. Rather, Jim Clipson testified unequivocally that he, not First National, took the equipment to the auction and that, in doing so, he was acting at John Engstrom's request, not First National's. The testimony of Travis Wegenhoft, John Engstrom's bank officer, was to the same effect. The testimony is set forth in the Appendix at 1A.

Petitioners contend that this evidence was not decisive of their claims. They contend that there was other evidence, "disregarded" by the trial court and the Fifth Circuit, which controverted this evidence and raised fact issues as to: (a) whether First National caused the auction sale, and (b) whether Clipson was acting as an agent of First National in placing the equipment in the auction. Petition at 17-27. These arguments are without merit.

A. Petitioners Did Not Raise an Issue of Fact Supporting Their Claim That First National Caused the Sale.

Petitioners rely on three items of "evidence" for their contention that they raised an issue of fact as to whether First National was responsible for the auction sale. The items are as follows:

(1) The assertion that not only did John Engstrom not ask Jim Clipson to sell any equipment at auction, but that John Engstrom specifically instructed Jim Clipson not to do so;

(2) A problem loan report of First National, written prior to John Engstrom's period of active duty, stating that in the following crop year if John Engstrom "does not expect to pay out, ask him to move loan or furnish high-quality collateral or liquidate;" and

(3) A First National problem loan report that includes the following statements:

> "Have arranged for Jim Clipson, Jr., to sell all equipment. Rent house is for sale. . . . Will suggest lowering price closer to values used here. Have an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into bank's equipment auction."

Petition at 19-26. These three items do not raise a fact issue as to whether First National arranged for the equipment to be sold at auction.

As to the first item, there is *no* evidence that John Engstrom instructed Jim Clipson that he should not sell the equipment at auction, as the petitioners falsely claim. Petition at 22-23. John Engstrom's affidavit carefully avoids saying that, R.780, and in his deposition testimony Mr. Engstrom specifically stated that he did *not* give Jim Clipson any such instruction. His deposition testimony was as follows:

Q. And this [direction – that there should be no auction sale –] is a direction you gave to Mr. Clipson?

A. No . . . .

R.713-14. John Engstrom's only assertion was that he did not *ask* Jim Clipson to sell the equipment at the auction. This assertion may raise a question of fact as to whether Jim Clipson was correct in believing that he was acting at John Engstrom's request, as Jim Clipson says he believed; however it does not raise a question of fact as to whether Jim Clipson was acting at the direction of First National.[3] Moreover, the dispositive question is not whether John Engstrom told Jim Clipson not to sell the equipment at auction, but rather whether First National instructed him to do so. On this issue the evidence is clear and uncontroverted, it did not.

As to the second item of "evidence", petitioners state that First National documents show that First National was "planning" to "liquidate" John Engstrom's equipment at the auction. Petition at 7 & 11. This claim is simply a mischaracterization of the documents. The documents expressly reflect First National's plan to *ask* John Engstrom, to do one of three things if he could not repay the loans at maturity – move the loans, furnish high quality collateral, or liquidate. R.725. They do not state

---

[3] The only other record evidence even tangentially touching on the subject is the following. John Engstrom contended in an affidavit submitted in opposition to the motion for summary judgment that while advising First National that he had asked Jim Clipson to sell his equipment he also instructed Travis Wegenhoft that Wegenhoft should not sell the equipment at auction. R.780. Jim Clipson says that some time later John Engstrom asked him to sell any equipment not sold by private treaty at the auction. R.246-49. Jim Clipson then told Travis Wegenhoft that he would be doing so. R.676.

that First National will seize and sell his equipment, as petitioners falsely assert.

The next item on which petitioners rely consists of problem loan reports containing the following statements:

> "Have arranged for Jim Clipson, Jr., to sell all of equipment. Rent house is for sale. Will suggest lowering price closer to values used here. . . . Have an appraisal of equipment from local dealer and proceeding to sell equipment. Anything not sold will go into bank's equipment auction."

R.746. The first sentences reflect no more than John Engstrom's admitted request that Jim Clipson sell his equipment at private treaty. The last sentence simply reveals that First National was aware that Jim Clipson planned to sell any remaining equipment at auction. After all Jim Clipson had told Mr. Wegenhoft that he had been asked by John Engstrom to do this. R.767. These sentences do not contradict the testimony of Jim Clipson or Mr. Wegenhoft that the Bank did not direct or even request that Jim Clipson sell the equipment at the auction. Nothing in these sentences impeaches the testimony of Jim Clipson that he placed the equipment in the auction at John Engstrom's request, nor do they support petitioners' assertion that the auction was a foreclosure sale.

B. Petitioners Did Not Raise an Issue of Fact on Their Claim That Clipson Was First National's Agent.

Petitioners also argue that a jury would have been entitled to infer that "Jim Clipson cooperated, coordinated, and worked in concert with the Bank, and/or as the Bank's agent, in foreclosing on, taking possession of, and selling the Engstroms' equipment at the auction," from the evidence that First National cooperated in Jim Clipson's private treaty sales (by advancing funds for repair and advertising and by executing bills of sale releasing its liens). Petition at 26. But the conclusion petitioners would have had the lower courts draw does not in any way follow from the evidence cited. All of the evidence of cooperation relates to the pieces of equipment sold at private treaty by Jim Clipson, as directed by John Engstrom, not to the equipment sold by Jim Clipson in the auction sale.[4] John Engstrom has never denied that the private treaty sales were pursuant to his instructions. (Indeed, John Engstrom's complaint was that Jim Clipson was not given the opportunity to sell all of the equipment at private treaty.) Mr. Engstrom in fact testified in his deposition and in his affidavit that he directed the very arrangements for advertising, repair, and commissions that petitioners now say are arrangements attributable to First National. R.780-81; 712-15. Indeed, petitioners

---

[4] The Petition also asserts that there was evidence to support a claim that one of the private treaty sales – the sale of a pickup truck to L.D. Schilling – was made against John Engstrom's wishes. The sale of the pickup truck was not relevant to the motion for summary judgment, however, because petitioners asserted no claim below about this or any other private treaty sale.

themselves conceded below that "these individual sales were not part of the January 26 auction and therefore are not directly made the basis of Plaintiffs' claims for relief . . . . " R.2502. Thus, the record neither controverts Jim Clipson's and Travis Wegenhoft's testimony that First National played no role in Jim Clipson's decision to place the equipment in the auction nor does it support petitioners' claim that Jim Clipson was First National's agent.[5]

III

FIRST NATIONAL IS NOT LIABLE UNDER § 532(4) OF THE CIVIL RELIEF ACT

Petitioners next argue that they raised an issue of fact as to whether First National "caused" the auction sale in violation of section 532(4) of the Civil Relief Act. Petitioners appear to be saying that First National should be held liable if for no other reason than "but for" Sam Thomson's discussing with Billy Bode the possibility of holding an auction in Eagle Lake there would have been

---

[5] Assuming *arguendo* that petitioners did raise an issue of fact as to whether First National had seized and sold John Engstrom's equipment, thereby violating the Civil Relief Act, the Fifth Circuit was nevertheless correct in affirming the summary judgment as to all petitioners other than John Engstrom, on a ground argued below but not reached. More specifically, John Engstrom, as the owner of the equipment, was the only proper party to complain of its alleged wrongful repossession; the other petitioners, who were neither owners of the equipment nor parties to the note and security agreement relating to the equipment and from whom no collection was attempted, are not. R.234, 237.

no auction and, therefore, John Engstrom's equipment could not have been sold in an auction.[6] While it is true that, if this particular auction had not occurred, Jim Clipson could not have taken the equipment to the auction to sell it, nothing follows from this. Section 532(4) of the Civil Relief Act prohibits a lender from making or causing to be made a sale, foreclosure, or seizure in satisfaction of its indebtedness. It does not purport to impose liability on a lender who does not interfere with a sale by someone else, especially when as here it is uncontroverted that the lender has been told and believes that the sale is authorized. Further, nothing in the Civil Relief Act remotely purports to put lenders to the Hobson's choice of interfering with a sale they have been told was arranged by the owner, risking liability if they are wrong, or of not interfering and being held liable because the seller's agent was allegedly acting without authority.[7]

---

[6] Petitioners' complaint that the evidence supported a finding that the auction was the "bank's auction" is similarly misguided. Even if the auction were First National's auction that would not change the essential fact that Jim Clipson was not asked by First National to sell John Engstrom's equipment at the auction. R.246-49. Nothing in the Civil Relief Act purports to impose liability on an auctioneer if a neighbor sells equipment at the auction mistakenly believing that he has been asked by the owner to do so.

[7] Petitioners also complain of the Fifth Circuit's determination that petitioners had no claim under section 532(4) of the Civil Relief Act, because it is a criminal statute, but offer no argument or authority in support of their complaint. Petition at 28.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES W. SCHWARTZ
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
Telephone: (713) 758-3852
Facsimile: (713) 615-5504

Counsel of Record for Respondent The First National Bank of Eagle Lake

OF COUNSEL:

DAVID M. BOND
ERNEST J. BLANSFIELD, JR.
VINSON & ELKINS L.L.P.
2300 First City Tower
1001 Fannin
Houston, Texas 77002-6760
Telephone: (713) 758-2586
Facsimile: (713) 615-5554

APPENDIX

Mr. Clipson testified as follows:

Q. Was it Travis [Wegenhoft, an employee of First National] that asked you to go ahead and bring the equipment in for the auction?

A. No, John [Engstrom] asked me to do it.

Q. When did John ask you to do that?

A. He asked me on the road one day there. It was later, after we had talked about the 5 percent and everything that I was going to get for commission, that he thought that his father was going to get it done for him and that if he didn't though, would I do it.

Q. That was before he had gone off to the war; is that right?

A. Yes, sir. Seems like he came back for a weekend or something. I don't know. It was at a later time though than when we first started talking about it.

Q. You say he asked you. Did he ever put that in writing to you?

A. No, he just asked me to do it for him.

* * *

Q. Now, I believe I recall you saying that the equipment was at three different locations; is that right?

A. Yes, sir.

Q. And they remained at three different locations for how long?

A. I just tried to keep selling them from the location that they were at right up to the

last minute there. And then it – if I'd known I was going to have to move them earlier, it would have been a lot better because it started raining and they made a pipeline across the road going into where their equipment was.

Q. How did you find out you were supposed to move them when you did?

A. Well, John had just asked me to move them if it didn't look like that his father was going to be able to get his brothers to do that. So, within about two weeks and nothing had happened, seemed like it might have been another lag of a day or two before we actually got into the work of moving them. Of course, it was raining and wet; and we couldn't do anything anyway.

R.246-49.

Mr. Wegenhoft testified:

Q. So, the bank didn't sell it [the equipment] at the auction sale?

A. No.

Q. Who did?

A. John Engstrom instructed Jim Clipson to deliver it to the sale. Well, that's my understanding; but from here it sounded like John Engstrom's folks were supposed to deliver it.

Q. So, it's the position of the bank that they didn't instruct anybody to sell this at the auction, correct?

A. That's right.

Q. That they didn't take possession of this equipment at all.

A. Right.

Q. And that's why we see no notices of sale in here, in any of these files, do we, because the bank didn't sell it?

A. That's right.

Q. And they didn't repossess it.

A. That's right.

R.242.